

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 07-05726

ORDER DENYING DEBTOR'S REQUEST FOR WAIVER OF PRE-PETITION
CREDIT COUSELING REQUIREMENT

The relief set forth on the following pages, for a total of 4 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
11/29/2007



Entered: 11/30/2007

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Sharon Lynn Smith,

Debtor(s).

C/A No. 07-05726-DD

Chapter 7

**ORDER DENYING DEBTOR'S
REQUEST FOR WAIVER OF PRE-
PETITION CREDIT COUSLING
REQUIREMENT**

THIS MATTER is before the Court on Sharon Lynn Smith's ("Debtor") Certification of Inability to Complete Pre-Petition Credit Counseling ("Certification"). A hearing was held in this matter on November 20, 2007. The United States Trustee ("UST") appeared for the hearing but Debtor failed to appear.

Debtor filed her Chapter 7 bankruptcy petition and the Certification at issue *pro se* on October 22, 2007. The Debtor requested that the Court grant her an exemption from the credit counseling requirement of 11 U.S.C § 109(h)(1).¹ On October 26, 2007 the Court entered an order requiring the Debtor to provide the Court with any documentation that supported her contention that she was entitled to the exemption under § 109(h)(4). On November 5, 2007 Debtor filed a copy of an order from the Social Security Administration ("SSA") issued by the Honorable John Randolph Martin, Administrative Law Judge.

Judge Martin's order supports Debtor's contention that she is disabled and has limitations of physical activity. However, Judge Martin's order does not support a finding that Debtor is disabled to the extent required by § 109(h)(4) for exemption from the credit counseling requirement of § 109(h)(1).

¹ Further references to the Bankruptcy Code shall be made by section number only.

In order for a debtor to receive an exemption under § 109(h)(4) the debtor must make a showing that the disability is so debilitating that he or she is “unable, after reasonable effort, to participate in an in person, telephone, or internet briefing.”

§ 109(h)(1). “The purpose of the exemption is to avoid ‘the absurd situation in which a debtor would be required to obtain a briefing even if suffering from Alzheimer's disease or some other disability that would make the briefing meaningless or even impossible.’”

In re Hall, 347 B.R. 532, 534-535 (Bankr. N. D. W. Va. 2006)(citing 2 *Collier on Bankruptcy* P 109.09[4] (Alan N. Resnick & Henry J. Sommer eds. 15th ed. rev. 2006)).

While the purpose of the exemption is to relieve debtors who would not or cannot benefit from a credit counseling session from the requirement, the standard for relief is high.

The debtor must be unable to participate in the briefing, whether in person, by telephone, or internet connection. A three prong test adopted by several courts provides:

From what this Court can ascertain, it appears that "disability" exemption under 11 U.S.C. § 109(h)(4) can only apply if a debtor demonstrates that: (1) the debtor is severely physically impaired; (2) the debtor has made a reasonable effort, despite the impairment, to participate in the prepetition credit counseling; and (3) the debtor is unable, because of the impairment, to participate meaningfully in an in person, telephone, or Internet briefing prepetition.

In re Tulper, 345 B.R. 322, 326 (Bankr. D. Colo. 2006). *See also In re Winston*, 2007 WL 1650926, 2007 Bankr. LEXIS 2011 (Bankr. E. D. Cal. 2007); *Hall*, 347 B.R. 532(Bankr. N. D. W. Va. 2006).

The *Hall* Court further states,

[W]hether or not a debtor suffers from a severe physical impairment is a matter of proof. What constitutes a "reasonable effort," as is required by § 109(h), is not defined and is open to a case by case determination. Indeed, a debtor's physical impairment may be so severe as to wholly excuse the debtor from making any effort in obtaining the required service under the premise that the law will not require a futile act. Also, § 109(h) requires that a debtor be able to "participate in an in person, telephone, or internet briefing." What constitutes "participation" is a value judgment.... If a debtor cannot meaningfully participate in an instructional course on

personal financial management due to a "disability," then the course will not aid the debtor in avoiding future financial distress, and the debtor's mere physical presence during a course serves no meaningful purpose.^[2]

Hall, 347 B.R. 532, 536 (Bankr. N. D. W. Va. 2006).

A finding that Debtor is disabled to the extent required by § 109(h)(4) to receive an exemption is a matter of proof, and in the present case Debtor has failed to offer sufficient proof to the Court that she falls within the category of persons for which the exemption was designed. The decision of the SSA provides evidence that Debtor suffers a physical impairment and that she is “disabled” for purposes of receiving Social Security Disability benefits. It may even suggest that receiving a credit counseling briefing would be difficult for Debtor. However, the SSA order alone does not prove physical disability so severe as to render Debtor unable to participate in a pre-petition credit counseling briefing. The SSA order, noting some history of employment during the period of the Debtor’s disability, in fact suggests to the contrary.

Debtor failed to appear at the hearing and there is no other evidence before the Court. The Court denies Debtor’s request for an exemption from the credit counseling requirement of § 109(h)(1). Debtor shall have ten (10) days from the entry date of this order to obtain credit counseling from an approved credit counseling agency and file a certificate with the Court. If Debtor fails to do so this case may be dismissed without further notice or hearing.

AND IT IS SO ORDERED.

Columbia, South Carolina
November 29, 2007

² While the *Hall* Court’s discussion focuses on the financial management course required for a discharge pursuant to 727(a)(11) the Court believes these factors to be equally relevant to pre-petition credit counseling required by § 109(h)(1) as both Code sections allow a debtor to exempt the requirement if the debtor meets the standards of § 109(h)(4).